IN THE
TENTH COURT OF APPEALS

No. 10-15-00024-CR

GARY RAYMOND BALBOA,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 19th District Court
McLennan County, Texas
Trial Court No. 2014-204-C1

MEMORANDUM OPINION

In two issues, appellant, Gary Raymond Balboa, challenges his conviction for continuous sexual abuse of a child. *See* TEX. PENAL CODE ANN. § 21.02 (West Supp. 2015). Specifically, Balboa contends that the trial court abused its discretion in denying his motion for mistrial and overruling his objection to extraneous-offense evidence offered by the State. We affirm.

I. BALBOA'S MOTION FOR MISTRIAL

In his first issue, Balboa complains about the following statement made by the trial judge to the jury regarding note-taking: "I don't anticipate you'll have a sticking point." Balboa argues that this comment infringed on his right to the presumption of innocence, conveyed to the jury that the trial judge did not believe that there would be a disagreement about the testimony to be presented, and prevented him from receiving a fair trial. The State counters that the comment was made to describe the process for having the court reporter read back testimony, rather than as a comment on the weight of the evidence. Additionally, the State notes that the trial judge clarified his comment and instructed the jury to disregard any notion that the comment went to the weight of the evidence.

A. Applicable Law

We review the denial of a motion for mistrial under an abuse-of-discretion standard. *Archie v. State*, 221 S.W.3d 695, 699-700 (Tex. Crim. App. 2007). Under this standard, we uphold the trial court's ruling as long as the ruling is within the zone of reasonable disagreement. *Id.* "'A mistrial is a device used to halt trial proceedings when error is so prejudicial that expenditure of further time and expense would be wasteful and futile.'" *Wood v. State*, 18 S.W.3d 642, 648 (Tex. Crim. App. 2000) (quoting *Ladd v. State*, 3 S.W.3d 547, 567 (Tex. Crim. App. 1999)). It is appropriate only for "a narrow class of highly prejudicial and incurable errors." *Id.*; *see Hawkins v. State*, 135 S.W.3d 72, 77

(Tex. Crim. App. 2004). Therefore, a trial court properly exercises its discretion to declare a mistrial when, due to the error, "an impartial verdict cannot be reached" or a conviction would have to be reversed on appeal due to "an obvious procedural error." *Wood*, 18 S.W.3d at 648; *see Ladd*, 3 S.W.3d at 567.

B. Facts

After the jury was seated, the trial judge provided numerous instructions to jurors, including guidance on note-taking procedures. When describing the proper use of notes taken in court, the trial judge stated:

> If you get to a sticking point, there's a way to handle that, but it will take every bit as long or longer to put that evidence on again, but rather than have an unfair trial, we will do that, okay? I don't anticipate you'll have a sticking point. I—I think I've only had that happen one time in 20-something years of jury service, and I don't anticipate it will happen in this one, but I am telling you, you know, but your notes don't resolve the issues. They only help you with your memory, and then that's where there's twelve of you.

Shortly thereafter, court was adjourned for the day. When the proceedings commenced the following morning, Balboa moved for a mistrial outside the presence of the jury, arguing that the aforementioned statements were "a comment on the conclusiveness of the evidence in this case that infringes upon the Defendant's presumption of innocence and his right to a fair trial." The trial judge denied Balboa's motion, but provided the following instruction when the jury came back to the courtroom:

> Well, yesterday I gave you some instructions. One of the instructions I gave you was regarding note-taking, and I talked to you about what could happen if you got stuck, and the process for getting the court reporter to go back over and review the record, and I made the statement that, "I don't think you'll get stuck in this case," and I think that I made that statement because in the over 20 years that I've sat on jury cases I have never had a jury get stuck on a particular issue and send the note back asking for the court reporter to come up.
>
> I want you to understand I have absolutely no idea what the evidence is going to be in this case, okay? I haven't reviewed the evidence. There's been some small hearings in regard to it, but I don't know the overall evidence, and I have no intention of making any comment to you, and the comment I made yesterday about you not getting stuck has nothing to do with my thoughts as to whether or not the case is a strong case, weak case and has any validity or no validity. I have no idea.
>
> You are the sole judges of the evidence in this case and the guilt or innocence of the Defendant in this case. I have no opinion in regard to that. I'm not allowed to by law and don't intend to indicate to you any such opinion and never will. Anything I say or do during this case as it's on trial or any case has nothing to do with any opinion as to the guilt or innocence of any defendant. As a Judge I'm not allowed to take that position unless I become the finder of fact.

Thereafter, the State proffered the testimony of numerous witnesses, as well as documentary evidence, to prove its case.

C. Discussion

Under article 38.05 of the Texas Code of Criminal Procedure, a judge shall not discuss the evidence. *See* TEX. CODE CRIM. PROC. ANN. art. 38.05 (West 1979). Specifically,

> [i]n ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible, nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case.

Id.; *see Brown v. State*, 122 S.W.3d 794, 798 (Tex. Crim. App. 2003) (holding that a trial judge must refrain from making any remark calculated to convey his opinion of the case because jurors give special and peculiar weight to the language and conduct of the trial judge). "The trial court improperly comments on the weight of the evidence if it makes a statement that implies approval of the State's argument, indicates disbelief in the defense's position, or diminishes the credibility of the defense's approach to the case." *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *see Hoang v. State*, 997 S.W.2d 678, 681 (Tex. App.—Texarkana 1999, no pet.).

Reviewing courts must address whether the complained-of comments are material to the case. *See Simon*, 203 S.W.3d at 592 (citing *Burge v. State*, 443 S.W.2d 720, 724 (Tex. Crim. App. 1969)). "A matter is material if the jury had the same issue before it." *Id.* (citing *Jackson v. State*, 548 S.W.2d 685, 695 (Tex. Crim. App. 1977)). To reverse a judgment on the ground of improper conduct or comments of the judge, we must find: (1) that judicial impropriety occurred; and (2) probable prejudice to the complaining party. *Dockstader v. State*, 233 S.W.3d 98, 108 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd).

Based on our review of the record, we cannot say that the trial court abused its discretion in denying Balboa's motion for mistrial. *See Archie*, 221 S.W.3d at 699-700. Besides Balboa's speculation, there is no indication that the trial judge's comments about note-taking undermined the presumption of innocence, expressed approval for the State's argument, or diminished the defense's approach to the case, especially when the

comments are considered in the context in which they were made. *See* TEX. CODE CRIM. PROC. ANN. art. 38.05; *see also Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001) (noting that a trial court's comments do not constitute fundamental error unless they rise to "such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury")[1]; *Simon*, 203 S.W.3d at 590; *Hoang*, 97 S.W.2d at 681.

Moreover, before any testimony was taken, the trial judge provided clarifying instructions to the jury, wherein he emphasized that he had no opinion on the evidence or on the guilt or innocence of Balboa. The Texas Court of Criminal Appeals has held that, in most cases, any harm can be cured by such instructions. *See Wood*, 18 S.W.3d at 648 (citing *Hernandez v. State*, 805 S.W.2d 409, 413-14 (Tex. Crim. App. 1990)); *see also Ladd*, 3 S.W.3d at 567. Furthermore, the law generally presumes that instructions to disregard and other cautionary instructions will be duly obeyed by the jury. *See Archie v. State*, 340 S.W.3d 734, 741 (Tex. Crim. App. 2011); *see also Reed v. State*, 421 S.W.3d 24, 33 (Tex. App.—Waco 2013, pet. ref'd). Accordingly, we must presume that the jurors understood that the trial judge's instructions were not an improper comment on the evidence or on the guilt or innocence of Balboa. *See Archie*, 340 S.W.3d at 741; *see also Reed*, 421 S.W.3d at 33. And as such, we overrule Balboa's first issue.

[1] The *Jasper* Court recognized that several types of comments do not rise to the level of fundamental error, including those the trial court makes to correct counsel's misstatement or misrepresentation of previously-admitted testimony, to maintain control and expedite the trial, to clear up a point of confusion, or to reveal irritation at counsel. 61 S.W.3d 413, 421 (Tex. Crim. App. 2001).

II. EXTRANEOUS-OFFENSE EVIDENCE

In his second issue, Balboa contends that the trial court erred by permitting the State to introduce extraneous evidence of sexual abuse that was not charged in the indictment, which allegedly resulted in an unfair trial for Balboa. Specifically, Balboa argues that article 38.37 of the Texas Code of Criminal Procedure violates the Due Process Clause of the United States Constitution.[2] *See* TEX. CODE CRIM. PROC. ANN. art. 38.37 (West Supp. 2015); *see also* U.S. CONST. amend. V.

A. Applicable Law

We review a trial court's admission or exclusion of evidence for an abuse of discretion. *Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). A trial court abuses its discretion if it acts arbitrarily or unreasonably, without reference to any guiding rules or principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). When considering a trial court's decision to admit or exclude evidence, we will not reverse the trial court's ruling unless it falls outside the "zone of reasonable disagreement." *Id.* at 391; *see Manning v. State*, 114 S.W.3d 922, 926 (Tex. Crim. App. 2003).

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[2] Section 2(b) of article 38.37 of the Texas Code of Criminal Procedure is the focus of Balboa's complaint. This section provides as follows:

> Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2-a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

TEX. CODE CRIM, PROC. ANN. art. 38.37, § 2(b) (West Supp. 2015).

B. Facts

Prior to opening statements and the commencement of evidence in the case, the trial court conducted a hearing pursuant to article 38.37 of the Texas Code of Criminal Procedure outside the presence of the jury. See Tex. Code Crim. Proc. Ann. art. 38.37, § 2-a. At the hearing, the State proffered extraneous-offense testimony from Ann Sims, M.D. and K.B. regarding additional instances of sexual abuse allegedly perpetrated by Balboa. At the conclusion of this testimony, Balboa objected, arguing the following:

> We object to the propensity evidence because it infringes on Mr. Balboa's right for the jury to decide the issues in this case of whether or not—whether or not he's guilty of committing the elements of the offense as alleged in the Indictment in this case which is 2014-204, so because of—that's our argument, that the propensity evidence prevents him and infringes on his right to be tried on those allegations.

See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 368 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

This objection is substantially similar to the due-process argument Balboa makes on appeal; accordingly, we conclude that Balboa has preserved this complaint for appellate review. *See* TEX. R. APP. P. 33.1(a) (providing that a party preserves a complaint for appellate review if he makes a timely objection to the trial court that states the grounds with sufficient specificity to make the trial court aware of the complaint, unless the

specific grounds are apparent from the context); *see also Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014) (noting that the error alleged on appeal must comport with the objection made at trial). In any event, the trial court overruled Balboa's objection, but issued limiting instructions at the time the evidence was presented to the jury and in the jury charge.

C. Discussion

Though not as articulate, Balboa's argument in this issue is similar to the argument made in *Harris v. State*, No. 14-14-00152-CR, 2015 Tex. App. LEXIS 8723 (Tex. App.—Houston [14th Dist.] Aug. 20, 2015, no pet.). In *Harris*, the Fourteenth Court of Appeals addressed a challenge to article 38.37 under the Due Process Clause of the United States Constitution and ultimately concluded that the statute is constitutional. *See id.* at **8-14. Specifically, the *Harris* Court mentioned that the Legislature intended for section 2(b) of article 38.37 to: (1) bring the Texas Rules of Evidence in line with Federal Rule of Evidence 413(a), which several federal courts have determined does not violate the Due Process Clause because it does not implicate a fundamental right; and (2) "give prosecutors additional resources to prosecute sex crimes committed against children." *Id.* at *9, *11 (internal citations omitted).

The *Harris* Court also noted a defendant's right to a fair trial is protected by numerous procedural safeguards contained in the statute, including: (1) the requirement that the trial court conduct a hearing before the evidence is introduced to determine

whether the evidence will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; (2) defense counsel's right to challenge any witness's testimony by cross-examination at the hearing; and (3) the requirement that the State give the defendant notice of its intent to introduce the evidence in its case-in-chief not later than the thirtieth day before trial. *Id.* at **12-13. Each of these procedural safeguards were followed in the instant case.

And finally, the *Harris* Court explained that section 2 of article 38.37 does not "'impermissibly lessen the State's burden of proof in this case.'" *Id.* at *13 (citing *Jenkins v. State*, 993 S.W.2d 133, 136 (Tex. App.—Tyler 1999, pet. ref'd)). After review, we adopt the reasoning of the *Harris* Court and conclude that article 38.37 does not violate Balboa's constitutional right to due process.

Additionally, it is noteworthy that the trial court in this case provided the following instruction to the jury before admitting the complained-of testimony:

> Ladies and Gentlemen, the State has introduced or is about to introduce or present evidence that the Defendant has or may have committed crimes other than the offense alleged against him in the Indictment in this case. You may not consider said testimony for any purpose unless you find and believe beyond a reasonable doubt that the Defendant committed such other crimes, if any were committed, and even then you may only consider the same in determining the intent, if any, of the Defendant in connection with the offense alleged in the Indictment in this case and for no other purpose. It's not necessary that all of you agree that the Defendant committed these other crimes, but unless you as an individual juror believe beyond a reasonable doubt that the Defendant committed these other crimes, you may not consider this evidence for any purpose. This instruction will also be given [to] you with the charge that you'll receive later, so you should follow the instruction throughout the trial and when

> you make your determinations concerning the evidence, okay? So listen to the evidence, but unless it complies with the instruction—and you'll have that later—then you can—you shouldn't consider it. You may proceed.

The trial court also provided a substantially similar instruction in the charge.

Based on the foregoing, we cannot say that the trial court abused its discretion in admitting the complained-of evidence. *See Martinez*, 327 S.W.3d at 736; *Manning*, 114 S.W.3d at 926; *Montgomery*, 810 S.W.2d at 380. As such, we overrule Balboa's second issue.

III. CONCLUSION

Having overruled both of Balboa's issues, we affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed January 28, 2016
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